In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-582

LAURENCE H. FROMMHAGEN, PETITIONER

v.

J. HENRY GLAZER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner Frommhagen, a scientist employed by the National Aeronautics and Space Administration ("NASA") at the Ames Research Center (Moffett Field, California), brought this libel action in a California state court against respondent J. Henry Glazer, Chief Counsel at Ames. The cause was removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. 1442(a).

The district court, finding that the case raised no genuine issues of material fact, granted respondent's

motion for summary judgment (Pet. App. vii). The court of appeals affirmed, holding that respondent's action was privileged under *Barr* v. *Matteo*, 360 U.S. 564 (Pet. App. i-vi). Petitioner's request for a rehearing *en banc* was denied (Pet. 2).

The facts may be summarized as follows:

Petitioner, utilizing pre-established agency procedures, filed grievances against respondent and several other Ames officials (Pet. App. ii). The grievances were submitted to an independent arbitrator who received documentary evidence and took testimony, under oath, from respondent and the other parties. After completion of the grievance hearing, but before the arbitrator entered findings and recommendations, petitioner renewed his charges against respondent in a letter to the NASA General Counsel in Washington, D. C. In this letter, petitioner also disputed the sworn testimony respondent had given at the grievance hearing and, in general, commented adversely upon the Chief Counsel's conduct during the grievance proceedings (*ibid.*).

Upon receiving a copy of the letter, respondent sent a memorandum to petitioner demanding a retraction. When petitioner declined to retract his statements, respondent wrote the memorandum of April 1, 1968, which is the basis of this suit. (For complete text see Pet. App. iii-iv). The memorandum was sent to petitioner with copies to the Chief of the Ames Personnel Division and two other supervisory officials (*ibid.*). It set forth respondent's belief that he had been libeled and that petitioner's failure to re-

tract the statements was the result of either arrogance or stupidity (Pet. App. iii). Respondent also stated that

> [b]y copy of this memorandum (with attachments) to the Chief of ARC Personnel Division I am formally charging you with libeling me before senior NASA officials, and registering a request that appropriate disciplinary action be taken against you consonant with agency procedures.[1]

Respondent filed in the district court an affidavit of Ames' Associate Director, which stated that (Pet. App. v)

> notwithstanding the federal office which he holds as Chief Counsel of the NASA-Ames Research Center, [respondent] merely by virtue of federal employment with NASA was authorized to send or cause to be sent without recourse to, or approval from, any NASA official the April 1st inter-office memorandum under the circumstances described since the same constitutes a request, or petition, to the management of the NASA-Ames Research Center to institute agency disciplinary action against [Frommhagen] for alleged misconduct in libeling [respondent] in official communications with principal officers of NASA, and that any employee of the NASA-Ames Research Center may so petition the management of the Center.

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[1] A short time later, respondent submitted another memorandum to the Personnel Division which set forth, in more detail, his reasons for requesting that disciplinary action be taken (Pet. App. iv).

The courts below correctly held that respondent's action was within the scope of his official duties and therefore immune from suit under *Barr* v. *Matteo*, 360 U. S. 564.[2] It is settled that federal employees have the right, and, in some circumstances the duty, to apprise officials of unsatisfactory behavior by coworkers. See, *e.g. Preble* v. *Johnson*, 275 F.2d 275, 277-279 (C.A. 10); *West* v. *Garrett*, 392 F.2d 543, 544 (C.A. 5); *Keiser* v. *Hartman*, 339 F. 2d 597 (C.A. 3), certiorari denied, 381 U. S. 934. The memorandum did this and requested that formal disciplinary action be taken against petitioner. Having before them the text of the memorandum and the affidavits the district court and court of appeals properly found that there was no genuine issue of material fact to be resolved by a trial on the merits[3] and cor-

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[2] As the court of appeals noted:

> The principal significant difference between this case and *Barr* v. *Matteo* is that there the alleged libel was in an agency press release, whereas here Glazer's memorandum was sent only to persons within the agency, and each of them was a person to whom it was proper for him to send it. Thus this is a stronger case for immunity than *Barr* v. *Matteo*. See dissenting opinion of Chief Justice Warren, 360 U.S. at 583-84. • • • [Pet. App. v-vi.]

[3] Petitioner contends that respondent's grievance petition is "subject only to a qualified privilege which could be defeated by a show of malice" (Pet. 8). Official immunity attaches, however, when action is taken in the line of duty, without regard to whether that action was voluntary or obligatory. See, *e.g.*, *Barr* v. *Matteo*, *supra*; *Howard* v. *Lyons*, 360 U.S. 593; *Denman* v. *White*, 316 F. 2d 524 (C.A. 1). Nor can immunity be defeated by an allegation of malice. See,

rectly held that respondent "acted under color of federal office in writing and circulating the memorandum, and that [he] was therefore immune from personal liability for those acts" (Pet. App. v). *Barr* v. *Matteo*, *supra*, at 575. There is no novel point of law raised nor any conflict with decisions of this Court or the courts of appeal that would merit review by this Court.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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e.g., *Barr* v. *Matteo*, *supra*, at 568; *Chafin* v. *Pratt*, 358 F. 2d 349, 353 (C.A. 5), certiorari denied, 385 U.S. 878.

[4] Petitioner's reliance (Pet. 9) upon *Morgan* v. *Willingham*, 424 F. 2d 200 (C.A. 10), is misplaced. The record indicates that respondent did not rely upon "conclusory affidavits" to establish that he was acting within the scope of his official duties. See, *e.g.*, the affidavit of Ames' Associate Director, which is set forth in the court of appeals' opinion at Pet. App. v.

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